Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

HOWARD COLIN SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS W. MILLS, JR.
State Bar of Texas No. 14167500

Member Supreme Court Bar

MILLS, PRESBY & ANDERSON
3102 Maple Avenue, Suite 220
Dallas, Texas 75201
Tel: (214) 871-0290
Fax: (214) 871-0294

Attorney for Petitioner
Howard Colin Smith

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

This Court should grant certiorari because the judgment below incorrectly held that the "good-faith" exception to the exclusionary rule applies to evidence seized during an administrative arrest, even though the arrest warrant was not issued by a magistrate. The question presented is whether this holding contravenes the well-settled law of the Supreme Court, originating with *United States v. Leon*, 468 U.S. 897 (1984), which established that the good-faith exception to the exclusionary rule applies only to arrest situations in which evidence is seized by an arresting officer reasonably relying on a warrant issued by a neutral magistrate.

QUESTION TWO

This Court should grant certiorari because the judgment below incorrectly affirmed Petitioner's conviction. The question presented is whether the United States Court of Appeals for the Fifth Circuit erred in affirming the district court's conviction of Howard Colin Smith for violation of 18 U.S.C. § 922 (possession of a firearm by a convicted felon) when the district court failed to exclude evidence seized during Petitioner's arrest made pursuant to an administrative warrant unsupported by oath or affirmation and not reviewed by a magistrate for probable cause?

LIST OF PARTIES

Howard Colin Smith	Petitioner
Thomas W. Mills, Jr. David J. Przeracki Mills, Presby & Anderson 3102 Maple Avenue, Suite 220 Dallas, Texas 75201-1233 Tel. (214) 871-0290	Counsel for Petitioner
Joseph M. Revesz Michael R. Snipes Assistant U. S. Attorneys Northern District of Texas 1100 Commerce Street, Rm. 16G28 Dallas, Texas 74242 Tel. (214) 767-0951	Counsel for Respondent, United States of America

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> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree [ ].

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> It shall be unlawful for any person –

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(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year[.]

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No. _____

In The

Supreme Court of the United States

October Term, 1993

HOWARD COLIN SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Supreme Court From The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Howard Colin Smith, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on February 17, 1994.

PRIOR OPINIONS IN THIS CASE

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, *United States of America v. Howard Colin Smith*, No. 93-1543 (5th Cir. Feb. 17, 1994), is reproduced as Appendix A. The Memorandum Order of the United States District Court for the Northern District

of Texas, Dallas Division, *United States of America v. Howard Colin Smith*, No. 3:92-CR-510-G (N.D. Tex. Feb. 5, 1993) is reproduced as Appendix B.

JURISDICTION

On February 17, 1994, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming the decision of the United States District Court for the Northern District of Texas, thereby upholding Petitioner's conviction for violation of 18 U.S.C. § 922 (possession of a firearm by a convicted felon).

The Supreme Court has jurisdiction to review a decision of the United States Court of Appeals for the Fifth Circuit upon the granting of a petition for writ of certiorari under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Howard Colin Smith is a native and citizen of Jamaica. He has resided in the United States since 1984 and achieved "permanent resident alien" immigration status in 1985.

On November 18, 1992, an Assistant District Director of Investigations for the Immigration and Naturalization Service (the "INS") issued a "Warrant for Arrest of Alien" (the "Warrant") for the arrest of Mr. Smith. The Warrant was issued by the INS agent pursuant to section 242 of the Immigration and Nationality Act without review by

an impartial magistrate and without supporting affirmation or oath. A true and correct copy of the Warrant is attached as "Exhibit A" to Mr. Smith's Motion to Suppress Evidence and Brief in Support ("Motion to Suppress" – Appendix C).

On November 19, 1992, Howard Colin Smith was arrested by a team of various government agents and officers pursuant to the aforementioned Warrant. An automatic pistol was allegedly found in Mr. Smith's possession at the time he was arrested.

On December 8, 1992, the Grand Jury charged Mr. Smith with a violation of Title 18 of the United States Code, Section 922(g) for possession of a pistol.

On January 4, 1993, Mr. Smith filed his Motion to Suppress, demonstrating that the Warrant was issued in gross violation of the constitutional protections afforded by the Fourth Amendment and requesting the District Court to suppress all evidence gathered, seized or otherwise obtained by the United States as a result of his unlawful arrest.

On or about January 8, 1993, the Government filed its Response, attempting to establish the constitutionality of Mr. Smith's arrest and, apparently, attempting to alter nearly thirty years of well-settled evidence law (Appendix D).

On or about January 20, 1993, Mr. Smith filed his Reply (Appendix E), showing that the case law cited in the Government's Response was inapplicable and outdated. Nonetheless, on February 5, 1993, the District

Court entered a Memorandum Order denying Mr. Smith's Motion to Suppress (Appendix B).

On September 3, 1993, Mr. Smith entered a conditional plea of guilty, reserving his right to appeal the District Court's ruling on his Motion to Suppress. Mr. Smith was sentenced on September 10, 1993.

Notice of Appeal was timely given on or about June 8, 1993.

The United States Court of Appeals for the Fifth Circuit, affirmed the Petitioner's conviction in *United States of America v. Howard Colin Smith*, No. 93-1543 (5th Cir. Feb. 17, 1994) (Appendix A).

Court of Appeals Decision

Contrary to the holdings in *United States v. Leon*, 468 U.S. 897 (1984) and its progeny, which create and apply a good-faith exception to the exclusionary rule for evidence seized by arresting officers who rely on magistrate-issued warrants, the Fifth Circuit Court of Appeals affirmed the conviction of Howard Colin Smith. The Fifth Circuit found no error on the part of the trial court for denying Mr. Smith's Motion to Suppress, which had previously denied the Motion to Suppress on the basis of the good-faith exception to the exclusionary rule. At the crux of Petitioner's Motion to Suppress is the fact that he was arrested pursuant to an administrative warrant that was not issued by a magistrate or a neutral third party, contrary to the guaranties of the Fourth Amendment.

In reviewing the district court's conclusions of law *de novo*, and accepting the district court's findings of fact,

the Fifth Circuit held that "regardless of the constitutionality . . . of the INS administrative warrant, the good-faith exception to the warrant requirement applies to shield the firearm seized from Smith from the operation of the exclusionary rule." Thus, the Fifth Circuit, although aware that the administrative warrant pursuant to which the Petitioner was arrested had not been issued by a magistrate and was not supported by oath or affirmation, nonetheless held that the good-faith exception to the exclusionary rule was applicable.

In support of its decision, the Court of Appeals cited, *inter alia*, *United States v. Leon*, 468 U.S. 897 (1984); *United States v. Satterwhite*, 980 F.2d 317 (5th Cir. 1992); and *United States v. Webster*, 960 F.2d 1301 (5th Cir.) *cert. denied*, 113 S. Ct. 355 (1992). However, *all* of these cases involved magistrate-issued warrants, not magistrate-free administrative warrants like the warrant in the matter at hand.

The Fifth Circuit Court of Appeals did not reach the issue of the constitutionality of the INS administrative warrants, notwithstanding the district court's acknowledgment that no court has addressed their constitutionality in the context of criminal proceedings.

REASONS WHY THE WRIT SHOULD BE GRANTED

QUESTION ONE

This Court should grant certiorari because the judgment below incorrectly held that the "good-faith" exception to the exclusionary rule applies to evidence seized during an administrative arrest, even though the arrest

warrant was not issued by a magistrate. The question presented is whether this holding contravenes the well-settled law of the Supreme Court, originating with *United States v. Leon*, 468 U.S. 897 (1984), which established that the good-faith exception to the exclusionary rule applies only to arrest situations in which evidence is seized by an arresting officer reasonably relying on a warrant issued by a neutral magistrate.

Suppression Required; Good Faith Exception Not Applicable

For over thirty years, the United States Supreme Court has recognized that whenever evidence is seized pursuant to statutory authorizations which are later determined to violate Fourth Amendment principles, the arrest and search are illegal and the evidence obtained therefrom must be excluded. *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Michigan v. DeFillippo*, 443 U.S. 31, 39 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Wong Sun v. United States*, 371 U.S. 471 (1963). This "exclusionary rule" actually had its inception in 1914 when the Supreme Court held that the Fourth Amendment to the United States Constitution barred the use in federal prosecutions of evidence secured through an illegal search and seizure. *Weeks v. United States*, 232 U.S. 383 (1914).

More recently, however, the Supreme Court created certain "good-faith" exceptions to the exclusionary rule. *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). *See United States v. Satterwhite*, 980 F.2d 317 (5th Cir. 1992). In *Leon*, the Court

observed that the exclusionary rule was a judicially-created remedy to safeguard Fourth Amendment rights. But, the Court modified the rule to permit the introduction of evidence obtained by officers **reasonably relying on a warrant issued by a detached and neutral magistrate,** but ultimately found to be unsupported by probable cause. *Id.* In creating the good-faith exception, the Supreme Court said,

> [O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers **reasonably relying on a warrant issued by a detached and neutral magistrate** leads to the conclusion that such evidence should be admissible in the prosecution's case in chief.

Leon, 468 U.S. at 913 (emphasis added). The Court made it clear many times throughout the *Leon* opinion that the underlying reason for creating the good-faith exception rested on the Fourth Amendment requirement that warrants be issued by a detached and neutral magistrate. *Id.* at 913-14; 916-17; 920-23. *See infra* discussion. Time and time again, the Supreme Court and the circuit courts held that the good-faith exception to the exclusionary rule would apply narrowly, and only to arrest situations in which evidence is seized by an arresting officer who reasonably relied on a warrant issued by a neutral magistrate. *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Satterwhite*, 980 F.2d 317 (5th Cir. 1992); *United States v. Webster*, 960 F.2d 1301 (5th Cir. 1992); *United States v. Brown*, 951 F.2d 999 (9th Cir. 1991); *United States v. Roberts*, 852 F.2d 671 (2d Cir. 1988); *United States v. Tate*, 795 F.2d 1487 (9th Cir. 1986).

The Fifth Circuit, although aware that the administrative warrant pursuant to which the Petitioner was arrested had not been issued by a magistrate, nonetheless held that the good-faith exception to the exclusionary rule was applicable: "regardless of the constitutionality . . . of the INS administrative warrant, the good-faith exception to the warrant requirement applies to shield the firearm seized from Smith from the operation of the exclusionary rule." *United States of America v. Howard Colin Smith*, No. 93-1543, slip op. at 8 (5th Cir. Feb. 17, 1994). Again, the error in the Fifth Circuit's reasoning arises in the fact that the very cases the court cites to support its holding (*United States v. Leon*, 468 U.S. 897 (1984) and *United States v. Satterwhite*, 980 F.2d 317 (5th Cir. 1992)) involved magistrate-issued warrants, unlike the administrative warrant actually used in the matter at hand.

The practical effect of the Fifth Circuit's ruling is the evisceration of Fourth Amendment rights: Legislatures throughout the Land will have the opportunity to eliminate the now-required finding of probable cause before a warrant may issue.

Because this Court has never extended the good-faith exception to the exclusionary rule to evidence seized pursuant to warrants not issued by a magistrate, and because the cases cited by the Fifth Circuit are inapplicable to Mr. Smith's administrative warrant arrest situation, the opinion of the Fifth Circuit must be reversed.

Suppression Required; Unreasonable Reliance

A second reason for reversing the Fifth Circuit is that the court erroneously held that the arresting officer reasonably relied on the facially invalid INS administrative warrant.

It is well-established that the good-faith exception does not apply in matters such as the instant case, where the arrest warrant is so deficient that the executing officers could not reasonably have presumed it to be valid, (*Leon* at 923), and the officers ***should have known*** that the underlying statute was unconstitutional.[1] *Illinois v. Krull*, 480 U.S. 340, 355 (1987):

> A statute cannot support objectively reasonable reliance [by a law enforcement officer] if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. ***Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.***

Illinois v. Krull, 480 U.S. 340, 355 (1987) (emphasis added).

In the instant matter, the Fifth Circuit and the district court erroneously concluded that the arresting officer acted objectively and reasonably in executing the INS warrant. In reaching their conclusions, both courts erred by emphasizing the officers' reliance on the administrative

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[1] The underlying statute – § 242 of the Immigration and Nationality Act – is unconstitutional as applied to criminal proceedings because it authorizes arrest warrants without the requirement of issuance by a magistrate. *See infra* discussion.

warrant in connection with deportation proceedings.[2] The flaw in this reasoning is that this matter is *not* a deportation proceeding. It is a criminal matter.

Mr. Smith now urges the Supreme Court to correct the error of the Fifth Circuit Court of Appeals (and the district court) by overturning his conviction for violation of 18 U.S.C. § 922. In so doing, the Supreme Court will dissolve the conflict between the Fifth Circuit decision and the well-established law of this Court.

QUESTION TWO

This Court should grant certiorari because the judgment below incorrectly affirmed Petitioner's conviction. The question presented is whether the United States Court of Appeals for the Fifth Circuit erred in affirming the district court's conviction of Howard Colin Smith for violation of 18 U.S.C. § 922 (possession of a firearm by a convicted felon) when the district court failed to exclude evidence seized during Petitioner's arrest made pursuant to an administrative warrant unsupported by oath or

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[2] Fifth Circuit: "[Smith] cites no cases supporting his argument that no reasonable INS agent could have so relied on an administrative warrant issued pursuant to deportation proceedings." *United States of America v. Howard Colin Smith*, No. 93-1543, slip op. at 7 (5th Cir. Feb. 17, 1994). District Court: "Since use of INS administrative warrants is commonplace in deportation proceedings, it is unlikely that any of the agents would objectively have had reason to believe that the warrant was unconstitutional." Memorandum Order of the United States District Court for the Northern District of Texas, Dallas Division, *United States of America v. Howard Colin Smith*, No. 3:92-CR-510-G, at 4 (N.D. Tex. Feb. 5, 1993).

affirmation and not reviewed by a magistrate for probable cause?

INS Regulation Unconstitutional; Warrant Invalid

In order for a warrant to be valid, it must meet the requirements specified in the Fourth Amendment.[3] Specifically, the minimum constitutional requirements for an arrest warrant are: 1) a pre-issuance determination of probable cause; 2) issuance only upon oath or affirmation in support of probable cause; and 3) particularity in describing the person to be arrested. Fourth Amendment, U.S. CONST.

Section 242 of the Immigration and Nationality Act is unconstitutional as applied to criminal procedures because it calls for the issuance of warrants for arrest by the INS' *own agents*, and not by impartial magistrates or other neutral and detached parties. Petitioner further challenges the constitutionality of section 242 because the regulation allows for the issuance of warrants without the requirement of an oath or affirmation supportive of probable cause, thus violating the plain language of the Fourth Amendment.

The Supreme Court has consistently and repeatedly stated that the facts justifying probable cause to search or arrest must be subjected to the scrutiny of an impartial magistrate. *United States v. United States District Court,*

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[3] Of course, all persons present in the United States – including those who are not citizens – must be afforded Fifth Amendment procedural protections in conjunction with any deprivation of liberty. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

407 U.S. 297 (1972); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968); *Aguilar v. Texas*, 378 U.S. 108 (1964); *United States v. Lefkowitz*, 285 U.S. 452 (1931); *B.P. Oil, Inc. v. Marshall*, 509 F. Supp. 802 (E.D. Pa. 1981). In *Johnson v. United States*, 333 U.S. 10 (1948), the Supreme Court noted that the purpose behind the warrant process is to interpose a neutral figure between the arrestee and the officer "engaged in the often competitive enterprise of ferreting out crime." In *Johnson*, the Supreme Court emphasized the importance of an impartial review by a magistrate: "[a]ny assumption that evidence sufficient to support a magistrate's disinterested determination to issue a . . . warrant will justify the officers in . . . [acting] . . . without a warrant would reduce the amendment to a nullity . . . ." *Id.*

In addition to the requirement of impartial review by a magistrate, the plain language of the Fourth Amendment states that "no Warrants shall issue, but upon probable cause, ***supported by oath or affirmation*** . . . ." U.S. CONST. amend. IV. (emphasis added). Numerous federal and state courts have reiterated the oath or affirmation requirement. *See, e.g., Weeks v. United States*, 232 U.S. 383 (1914); *United States v. Wroblewski*, 105 F.2d 444 (7th Cir. 1939); *Naples v. Maxwell*, 271 F. Supp. 850 (S.D. Ohio 1967). In 1933, the Supreme Court stated the requirement succinctly: "the facts or circumstances from which probable cause is found ***must*** be presented under oath or affirmation." *Nathanson v. United States*, 290 U.S. 41 (1933) (emphasis added).

The INS regulation pursuant to which the warrant for Petitioner's arrest was issued ignores the most fundamental constitutional requirements for warrant issuance.

Section 242.2(c) of the Immigration and Nationality Act reads as follows:

> (c) Warrant of arrest. (1) At the time of issuance of the Order to Show Cause . . . the respondent may be arrested and taken into custody under the authority of a warrant of arrest . . . . However such warrant may be issued by no other than [various INS officers and agents, including its]:
>
> (i) District director;
>
> (ii) Acting district director;
>
> (iii) Deputy district director;
>
> (iv) Assistant district director for investigations;
>
> (v) Deputy assistant district director for investigations . . . .

8 C.F.R. § 242.2(c) (1992). Blatantly absent from this regulation are the constitutional requirements that probable cause for warrant issuance be determined by a neutral and detached magistrate and that the arrest warrant be supported by an oath or affirmation.

In *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991), *rev'd on other grounds*, 113 S.Ct. 1439 (1993), the full court of appeals urged that portions of Section 242 of the Immigration and Naturalization Act were unconstitutional. Although the challenged portions of § 242 are inapposite here, one concurring justice analyzed the INS regulation which provides for warrantless arrests:

> Currently, an officer's determination . . . is subject only to review by a second immigration

> officer, who determines whether prima facie evidence of a violation of the immigration laws exists. If no second officer is available, the prima facie determination may be made by the original arresting officer. At no point does an official detached from the enforcement function test the sufficiency of the evidence to arrest and detain.

Id. (citations omitted). The justice continued by emphasizing "the importance of neutral and detached review as a protection against the overzealous prosecutor or law enforcement official." *Id. See also, Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("an impartial decision maker is essential"); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (warrant did not satisfy the requirements of the Fourth Amendment because it was not issued by a "neutral and detached magistrate"); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) ("A situation in which an official perforce occupies two practically and seriously inconsistent positions . . . necessarily involves a lack of due process"). A telling footnote in *Flores*, crucial to the instant matter, follows:

> The issuance of a warrant is covered by 8 C.F.R. § 242.2(c). ***These arrest warrants are issued by INS officers, not neutral third parties. Thus[,] even the presence of an arrest warrant does not indicate that the decision to detain has been reviewed by an official independent of the law enforcement function.***

Id. n.3 (emphasis added). Again, this is the regulation pursuant to which the warrant for Mr. Smith's arrest was issued.

Finally, in *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Supreme Court announced a two-part test to

be met by a warrant-issuing magistrate: "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest . . . ."

No court has addressed the constitutionality of section 242 arrest warrants in the context of criminal proceedings. This fact was acknowledged by the district court. Memorandum Order of the United States District Court for the Northern District of Texas, Dallas Division, *United States of America v. Howard Colin Smith*, No. 3:92-CR-510-G, at 2 (N.D. Tex. Feb. 5, 1993). Because § 242.2(c) calls for the issuance of warrants for arrest by *its own agents*, and not by impartial magistrates or other neutral and detached parties, the regulation, as applied to criminal proceedings, is unconstitutional on its face. Furthermore, because the regulation allows for the issuance of warrants without the requirement of an oath or affirmation supportive of probable cause, the regulation violates the plain language of the Fourth Amendment. It follows that the warrant for Petitioner's arrest, issued pursuant to the unconstitutional INS regulation, is invalid, and his resulting arrest and search illegal.

For the foregoing reasons, the Fifth Circuit Court of Appeals should have reversed Mr. Smith's conviction.

CONCLUSION

The questions raised in this Petition are important questions of federal constitutional law. The opinion of the United States Court of Appeals for the Fifth Circuit conflicts with decisions from this Court and other Courts of

Appeals. The Fifth Circuit opinion overlooks precedents established by this Court and will have a negative bearing on the jurisprudence of the United States. For these reasons, Mr. Smith respectfully prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

THOMAS W. MILLS, JR.
State Bar of Texas No. 14167500

Member Supreme Court Bar

MILLS, PRESBY & ANDERSON
3102 Maple Avenue, Suite 220
Dallas, Texas 75201
Tel: (214) 871-0290
Fax: (214) 871-0294

Attorney for Petitioner
Howard Colin Smith

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1543
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HOWARD COLIN SMITH,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-510-G)

(Filed Feb. 17, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges. PER CURIAM:[1]

In this appeal from his conviction for violating 18 U.S.C. § 922 (possession of a firearm by a convicted

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

felon), Howard Colin Smith challenges the constitutionality of the search and seizure, pursuant to an INS administrative warrant, that led to his indictment. We AFFIRM.

I.

Smith, a citizen of Jamaica, entered the United States in July 1984, and was accorded permanent resident status in December 1985. On November 23, 1988, he was convicted in Virginia of the felony offense of possession of cocaine, and sentenced to a one-year term of imprisonment. Because he was convicted of a drug offense, Smith became subject to deportation. 8 U.S.C. § 1251(a)(2)(B)(i).[2]

That same day, pursuant to an Order to Show Cause, the Immigration and Naturalization Service (INS) issued an administrative warrant for Smith's arrest. The warrant was issued under § 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(1), and regulations pursuant to that section. 8 C.F.R. §§ 242.1, 242.2(c)(1)(xi).[3]

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[2] That section provides: "Any alien who at any time after entry has been convicted of a violation of . . . any law . . . relating to a controlled substance . . . , other than a single offense involving [possession of a small amount of marijuana for personal use,] is deportable."

[3] 8 U.S.C. § 1252(a)(1) provides that an alien may be taken into custody pending a determination of deportability. Deportation proceedings against an alien are commenced with the issuance of an Order to Show Cause under 8 C.F.R. § 242.1. *See Johns v. Department of Justice*, 653 F.2d 884, 889-90 (5th Cir. 1981) (discussing application of statute and regulations); *Villegas v. O'Neill*, 626 F. Supp. 1241, 1242-43 (S.D. Tex. 1986) (same). Once the Order to Show Cause is issued, or at any time thereafter

The warrant was outstanding when, in July 1989, Smith was convicted in Texas of, *inter alia*, the felony offense of murder with a deadly weapon, and sentenced to a 10-year term of imprisonment, concurrent with five years imprisonment on another charge. He was released on parole in November 1992.

When INS agents received information that Smith had been released on parole, a new administrative warrant for his arrest was issued under the same regulations.[4] It was executed November 19, 1992. Smith was arrested by INS Special Agent George Putnam, acting in cooperation with agents of the FBI, Drug Enforcement Administration, and United States Treasury Bureau of Alcohol, Tobacco and Firearms. In a search incident to the

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until a warrant of deportation is issued, the alien may be arrested or taken into custody under the authority of an administrative warrant issued under 8 C.F.R. § 242.2(c), which provides:

> Warrant of arrest. (1) At the time of issuance of the Order to Show Cause, or at any time thereafter and up to the time the respondent becomes the subject of a duly issued warrant of deportation, the respondent may be arrested and taken into custody under the authority of a warrant of arrest. . . . However, such warrant may be issued by no other than [certain specified officers of the INS].

Smith does not dispute that this procedure was followed.

[4] Needless to say, murder is an "aggravated felony," the commission of which is also a deportable offense. 8 U.S.C. §§ 1101(a)(43), 1251(a)(2)(A)(ii). In its brief before this court, the government asserts (and Smith does not dispute), however, that the new warrant was issued pursuant to the Order to Show Cause that had been issued with the first warrant, in November 1988.

arrest, Putnam found a loaded, 9mm semi-automatic pistol in Smith's left front trouser pocket.

Based on the discovery of the firearm, Smith was charged with one count of violating 18 U.S.C. § 922(g)(1), which proscribes possession of a firearm by a convicted felon. Smith filed a motion to suppress the firearm, contending that it was seized from him pursuant to an unlawful arrest in violation of the Fourth Amendment. The government responded to the motion; Smith filed a reply to the response. Without a hearing, the district court denied the motion.[5] Smith entered a conditional guilty plea under Fed. R. Crim. P. 11(a)(2), reserving his right to appeal the district court's denial of the motion to suppress. He was sentenced to a 77-month term of imprisonment, to be followed by a three years supervised release.

II.

Smith challenges the district court's denial of his motion to suppress. In an appeal from the denial of such a motion, we review the district court's conclusions of law *de novo*, and accept its findings of fact unless they are clearly erroneous or "influenced by an incorrect view of

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[5] Smith did not request a hearing on the motion; and, as the district court noted, evidentiary hearings on motions to suppress are not granted automatically. *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983). This is especially true where, as here, the underlying facts relating to the seizure of the contested evidence are not disputed. *Id.* (citing *United States v. Smith*, 546 F.2d 1275, 1279-80 (5th Cir. 1977); *United States v. Poe*, 462 F.2d 195, 197 (5th Cir. 1972), *cert. denied*, 414 U.S. 845 (1973)).

the law". *United States v. Muniz-Melchor*, 894 F.2d 1430, 1433 (5th Cir.), *cert. denied*, 495 U.S. 923 (1990), *quoted in United States v. Ervin*, 907 F.2d 1534, 1537 (5th Cir. 1990). And, the evidence is viewed in the light most favorable to the prevailing party. *United States v. Lanford*, 838 F.2d 1351, 1354 (5th Cir. 1988), *cited in United States v. Lopez*, 911 F.2d 1006, 1008 (5th Cir. 1991).

Smith's challenge to the admissibility of the firearm is founded on a constitutional claim: that the INS statute and regulations, quoted supra, authorizing his arrest pursuant to an administrative warrant, do not satisfy the requirements the Fourth Amendment imposes for a warrant to be valid. Specifically, he claims that the INS administrative warrant authorizing his arrest is invalid, because it was not issued by a neutral and detached magistrate who made a finding of probable cause.[6] Because we hold that the good-faith exception to the exclusionary rule applies, we do not reach this issue. *See Jean v. Nelson*, 472 U.S. 846, 854-55 (1985) (reaffirming principle that "federal courts must consider nonconstitutional grounds for decision" before reaching constitutional questions (citing cases)); *Jackson v. Louisiana*, 980 F.2d 1009, 1011 (5th Cir. 1993) (same).

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[6] We emphasize that Smith does not contest the validity of the administrative warrant as it was used to arrest him pending deportation proceedings. He contends only that the warrant is unconstitutional "as applied to criminal procedures" i.e., that Special Agent Putnam's search of Smith incident to his arrest, and the use of evidence seized during that search in subsequent criminal proceedings, were unconstitutional.

In reviewing the denial of a motion to suppress evidence seized pursuant to an allegedly defective warrant, we first determine whether the good-faith exception to the exclusionary rule developed in *United States v. Leon*, 468 U.S. 897 (1984), applies. *United States v. Satterwhite*, 980 F.2d 317, 320 (5th Cir. 1992) (citing *United States v. Webster*, 960 F.2d 1301, 1307 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 355 (1992)). If we hold that it does, we need not address whether the warrant was supported by probable cause, unless the case concerns a " 'novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates.' " *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 264 (1983) (White, J., concurring)).

Under this analysis, we turn first to the applicability *vel non* of the good-faith exception. *Leon* established a narrow exception to the exclusionary rule for "evidence obtained by officers in objectively reasonable good-faith reliance upon a search warrant . . . even though the affidavit on which the warrant was based is insufficient to establish probable cause." *Satterwhite*, 980 F.2d at 322 (citing *Leon*, 468 U.S. at 922-23). Our review of the reasonableness of an officer's reliance on a warrant is *de novo*. *Id.* (citations omitted).

Smith contends that the good-faith exception is not applicable, because INS officers should have known that the statute authorizing administrative warrants was unconstitutional. He concedes that such warrants are commonly used in deportation proceedings. This notwithstanding, he contends that because the warrant was used as part of "a criminal matter", it was required to satisfy the Fourth Amendment. Because INS agents

should have realized that the warrant was deficient, Smith contends, they could not have acted objectively reasonably in relying on it to arrest and search him.

While it is true that Smith's case is a criminal proceeding, we cannot agree that INS Special Agent Putnam did not act objectively reasonably in relying on the administrative warrant for authority to arrest Smith, and search him incident to that arrest. *See United States v. Landry*, 903 F.2d 334, 339 (5th Cir. 1990) (declining to address constitutionality of city curfew ordinance not yet declared invalid, and holding that, assuming officer relied on it to make arrest, officer's good-faith reliance on it was objectively reasonable) (citations omitted). He cites no cases supporting his argument that no reasonable INS agent could have so relied on an administrative warrant issued pursuant to deportation proceedings.[7] To the

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[7] *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991), *reversed*, ___ U.S. ___, 113 S. Ct. 1439 (1993), cited by Smith, is inapposite. In *Flores*, the Ninth Circuit held regulations that strictly limited the release of arrested juvenile aliens were unconstitutional, particularly where the detainees posed "no apparent risk to the community" and because their "presence at their [deportation] hearings could be ensured by responsible individuals". *Id.* at 1355. Not only are these facts not present in the instant case, but also, the Supreme Court reversed the Ninth Circuit in *Flores*, ___ U.S. ___, 113 S. Ct. 1443, 1449 (noting Attorney General's "broad discretion" to regulate the custody of arrested aliens, and delegation of that authority to INS). The Court stated:

> If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles . . . who are aliens. For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien

contrary, on very similar facts, the Supreme Court held in *Abel v. United States*, 362 U.S. 217, 235-37 (1960) that INS officers acting pursuant to an administrative arrest warrant do have authority to make a limited search incident to that arrest.[8] *See also Chimel v. California*, 395 U.S. 752 (1969) (discussing permissible scope of search incident to arrest); *United States v. Chadwick*, 433 U.S. 1 (1977) (same).

The Court in *Abel* did not address the constitutionality of the statute or INS regulations leading to the issuance of the warrant. *Abel*, 362 U.S. at 230-234. It noted, however, that "[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time." *Id.* at 230. While, as stated, we also do not address the constitutionality of the administrative warrant used here, the fact that it has "the sanction of time" supports our conclusion that Putnam acted objectively reasonably in relying on it. *See also Johns*

> visitors has been committed to the political branches of the Federal Government. . . . Respondents do not dispute that Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings. . . .

Id. at 1449 (internal quotations and citations omitted).

[8] In *Abel*, INS officers, assisted by other law enforcement officers, arrested Abel, who was suspected of being a deportable alien. 362 U.S. at 222-25. Using a warrant of the same type used here, INS agents arrested Abel, and conducted a search for weapons and for documents to substantiate their suspicion that Abel was an alien. *Id.* at 223-24. In the course of that search, the agents discovered various paraphernalia later used as evidence in Abel's prosecution for espionage. *Id.* at 219-20. The Court held that this evidence was admissible in the espionage prosecution, notwithstanding that the seized articles were unrelated to the administrative warrant. *Id.* at 228-30.

v. Department of Justice, 653 F.2d 884, 889-90 (discussing, without questioning constitutionality of, 8 U.S.C. 1252 and INS administrative warrant procedures); *Villegas v. O'Neill*, 626 F. Supp. 1241, 1242-43 (S.D. Tex. 1986) (upholding INS post-arrest detention and hearing procedures against alien's due process challenge). We hold that, regardless of the constitutionality vel non of the INS administrative warrant, the good-faith exception to the warrant requirement applies to shield the firearm seized from Smith from the operation of the exclusionary rule.[9]

Having held that the good-faith exception to the exclusionary rule applies, we need not address whether the administrative warrant that the INS issued for Smith's arrest was supported by probable cause. Ordinarily, we would do so if the case concerned a "novel question of law whose resolution is necessary to guide

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[9] The *Abel* Court emphasized that its holding was grounded on the fact that the INS administrative warrant was not used as "an instrument of criminal law enforcement to circumvent" the legal restrictions imposed on criminal prosecutions. 362 U.S. at 230. Similarly, in the present case – despite Smith's bald assertion to the contrary – we find no evidence that the INS warrant was used to "circumvent the legal restrictions" of criminal law enforcement. As in *Abel*, the record is bare of any indication that "the decision to proceed administratively toward deportation was influenced by, [or] was carried out for, a purpose of amassing evidence in the prosecution for crime." *Id.* Indeed, the district court specifically noted that "the record strongly suggests that at the time the [administrative] warrant was issued, the INS had no intention of arresting and prosecuting Smith on ancillary criminal matters."

future action by law enforcement officers and magistrates." *Satterwhite*, 980 F.2d at 320 (citations and internal quotations omitted). It does not.

III.

For the foregoing reasons, the district court's denial of Smith's motion to suppress the firearm is

AFFIRMED.

Loc.R. 35. DETERMINATION OF CAUSES BY THE COURT EN BANC

35.1 *Caution.* As is noted in FRAP 35, en banc hearing or rehearing of appeals is not favored. Among the reasons for this is that each request for en banc consideration must be studied by every active judge of the Court and hence is a serious call on limited judicial resources. Counsel have a duty to the Court commensurate with that owed their clients to read with attention and observe with restraint the certificates required on them in 35.2.2 below. The Court takes the view that, given the extraordinary nature of suggestions for en banc consideration, it is fully justified in imposing sanctions of its own initiative under, *inter alia*, Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the suggestions, the represented party, or both, for manifest abuse of the procedure.

35.2 *Form of Suggestion.* Twenty copies of every suggestion of en banc consideration, whether upon initial hearing or rehearing, shall be filed. The suggestion shall not be incorporated in the petition for rehearing before the panel if one is filed, but shall be complete in itself. In no case shall a suggestion of en banc consideration adopt by reference any matter from the petition for panel rehearing of [sic] from any other briefs or motions in the case. A suggestion of en banc consideration shall contain the following items, in order:

35.2.1 Certificate of interested persons required for briefs by 28.2.1;

35.2.2 If the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel, as applicable:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: [citing specifically the case or cases]
>
> I express a belief, based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:
>
> [set forth each question in one sentence]
>
> _____
>
> Attorney of record for _____

Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of FRAP 35(a).

35.2.3 Table of contents and citations:

35.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A suggestion of en banc consideration must be limited to the circumstances enumerated in FRAP 35(a).

35.2.5 Statement of the course of proceedings and disposition of the case;

35.2.6 Statement of any facts necessary to the argument of the issues;

35.2.7 Argument and authorities. These shall concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.8. Conclusion; and

35.2.9 Certificate of Service.

35.3 *Response to Suggestion.* No response to a suggestion of en banc consideration will be received unless requested by the Court.

35.4 *Time and Form-Extensions.* Any petition for a suggestion of en banc consideration upon rehearing must be filed within 14 days after the date of the opinion. Counsel should not request extensions of time except for

the most compelling reasons. Printing delays will not be considered sufficient justification for extensions as clear and legible reproduced copies of typewritten petitions are authorized in the form prescribed by FRAP and Loc.R. 32.

35.5 *Length.* A suggestion for en banc consideration shall not exceed 15 pages in length, without permission of the Court.

[For other provisions relating to determination of causes by the Court En Banc and Petition for Rehearing, see FRAP 32, 35, 40, Loc.R. 41.3 and I.O.P. following Loc.R. 40.]

FIFTH CIRCUIT STATEMENT ON PETITIONS FOR REHEARING OR REHEARING EN BANC

NECESSITY FOR FILING

It is not necessary to file a petition for rehearing in the Court of Appeals as a prerequisite to the filing of a petition for certiorari in the Supreme Court of the United States.

PETITION FOR PANEL REHEARING

A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is *not* to be used for reargument of the issue previously presented or to attack the court's well settled summary calendar procedures. Petitions for rehearing are reviewed by panel members only. Four copies of all petitions for rehearing shall be filed.

EXTRAORDINARY NATURE OF SUGGESTIONS FOR REHEARING EN BANC

A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case, are matters for *panel rehearing* but not for rehearing en banc.

THE MOST ABUSED PREROGATIVE

Suggestions for rehearing en banc have in the past been the most abused prerogative of appellate advocates in the Fifth Circuit. While such suggestions were filed in 174 of the cases decided by this circuit last year, only one half of one percent of the cases decided by the court are reheard en banc; and most of the rehearings granted resulted from a request for en banc consideration by a judge of the court initiated independent of any suggestion.

PETITION FOR REHEARING EN BANC

The form, contents and number of copies of the suggestion are set out in Local Rule 35 copied on reverse side.

TIME FOR COURT TO ACT ON PETITIONS

Panel members have ten (10) days from the filing of the petition for rehearing or suggestion for rehearing en banc, if one is filed, to communicate to each other any concerns about the correctness of any fact or principle of law, or to request a poll of the en banc court where a suggestion for en banc rehearing is filed. Otherwise, the order will be entered denying the petition. This corrects the I.O.P. to Local Rule 35 "Requesting a Poll".

OP-JDT-8
Rev. 1/91

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CRIMINAL ACTION
VS.	)	NO. 3:92-CR-510-G
HOWARD COLIN SMITH	)	
Defendant.	)	

MEMORANDUM ORDER

(Filed Feb. 5, 1993)

Before the court is the motion to suppress of defendant Howard Colin Smith ("Smith"). For the reasons stated below, the motion is denied.

On November 19, 1992, agents of the Federal Bureau of Investigation, the Immigration and Naturalization Service ("INS"), and the City of Dallas Police Department arrested Smith, a resident alien, for the purpose of deporting him from the United States. The agents made the arrest pursuant to an administrative immigration arrest warrant issued by Neil Jacobs, Assistant Director of Investigations for the INS. *See* 8 C.F.R. § 242.2(c) (1992).[1]

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[1] Section 242.2 provides the INS with a mechanism for detaining and deporting an alien who has been convicted of or committed an act "which renders an alien excludable or deportable under any provision of law. . . . " 8 C.F.R. § 242.2(a)(2). In this case, the INS sought to deport Smith on the basis of his

A search incident to his arrest revealed that Smith was armed with a fully loaded, Taurus model 9mm semi-automatic pistol. On December 18, 1992, Smith was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).

Smith contends that the warrant authorizing his arrest was issued in contravention of his Fourth Amendment rights under the United States Constitution. Specifically, Smith alleges that § 242.2(c) is unconstitutional because it permits the issuance of an arrest warrant without the protection of independent review by a neutral magistrate. If his arrest was illegal, Smith argues, then the weapon that was seized subsequent to his arrest is inadmissible and must be suppressed.

Although no court has specifically addressed the constitutionality of § 242.2(c), the Supreme Court suggested in *Abel v. United States*, 362 U.S. 217 (1960), that such administrative warrants fit appropriately within our constitutional framework. In *Abel*, an alien defendant was arrested pursuant to an administrative warrant. Upon his arrest, officers searched the defendant and his hotel room and found numerous items that the government then used as evidence to prosecute him for espionage. The defendant filed a motion to suppress, which was denied by the district court, and he was later convicted.

Writing for the majority, Justice Frankfurter explained that whether "the administrative warrant

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conviction in the State of Virginia for unlawful possession of a controlled substance.

. . . was invalid, because it did not satisfy the requirements for 'warrants' under the Fourth Amendment, is not entitled to our consideration in the circumstances before us." *Abel*, 362 U.S. at 230. In dicta, however, Justice Frankfurter provided some insight as to how the Court viewed the constitutionality of administrative warrants.

> Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time. It would emphasize the disregard for the presumptive respect the Court owes to the validity of Acts of Congress, especially when confirmed by uncontested historical legitimacy, to bring into question for the first time such a long sanctioned practice of government. . . .

Id. Cf. Spinella v. Esperdy, 188 F. Supp. 535, 540-41 (S.D.N.Y. 1960) (interpreting *Abel* as suggesting that defendant's Fourth Amendment argument was "unsound"). This presumption of constitutionality was acknowledged again by Justice Powell more than fifteen years after *Abel*. *See United States v. Watson*, 423 U.S. 411, 425 (1976) (Powell, J., concurring) ("[I]t is fair to say, I think, that the prior decisions of the Court have assumed the validity of such arrests . . . ").

Even if Smith had a colorable claim against the constitutionality of § 242.2(c), it would not be necessary to suppress the evidence obtained from this search because of the "good faith" exception to the exclusionary rule. Under this exception, if an officer makes an arrest in good faith, evidence obtained as a result of that arrest will not be excluded if the statute under which the individual was arrested is later declared unconstitutional. *See*

United States v. Leon, 468 U.S. 897, 919-20 (1984). Because the purpose of the exclusionary rule is to deter unlawful police action, the good faith exception permits evidence obtained by officers who act "in objectively reasonable reliance on a warrant." *Illinois v. Krull*, 480 U.S. 340, 349 (1987). In detailing the nature of objective reasonableness, the Court has explained that "[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Id.* at 349-50; *see also Michigan v. DeFillippo*, 443 U.S. 31, 38 n. 3 (1979) ("To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule").

In the present case, the agents who arrested Smith were acting under a warrant issued by a proper official of the INS to effect Smith's deportation. Since use of INS administrative warrants is commonplace in deporation proceedings, it is unlikely that any of the agents would objectively have had reason to believe that the warrant was unconstitutional.[2] In light of the language in *Abel*, Smith's argument that the agents' actions were objectively unreasonable is unpersuasive. If one concludes, as the court does, that the agents' actions here were reasonable under the circumstances, then it necessarily follows that "excluding the [government's] evidence will not further the ends of the exclusionary rule in any appreciable way", *Krull*, 480 U.S. at 349 (quoting *Leon*, 468 U.S. at

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[2] In fact, the record strongly suggests that at the time the warrant was issued, the INS had no intention of arresting and prosecuting Smith on ancillary criminal matters.

920). Smith's motion to suppress is accordingly **DENIED.**[3]

SO ORDERED.

February 5, 1993.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

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[3] Smith has not requested a hearing on his motion, and such hearings are not granted as a matter of course. *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983). No evidentiary hearing is required when none of the critical facts is in dispute and the facts as alleged by the defendant, if true, would not justify the relief requested. *Id. (citing United States v. Smith*, 546 F.2d 1275, 1279-80 (5th Cir. 1977); *United States v. Poe*, 462 F.2d 195, 197 (5th Cir. 1972), *cert. denied*, 414 U.S. 845 (1973)).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO.
V.	§	3:92-CR-510-G
HOWARD COLIN SMITH	§	(Filed Jan. 4, 1993)

MOTION TO SUPPRESS EVIDENCE
AND
BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Howard Colin Smith, Defendant herein, by and through his attorney of record, Thomas W. Mills, Jr., and files this, his Motion to Suppress Evidence and Brief in Support and, in support thereof, would respectfully show unto the Court as follows:

1. BACKGROUND

Howard Colin Smith is a native and citizen of Jamaica. He has resided in the United States since 1984 and achieved "permanent resident alien" immigration status in 1985.

On November 18, 1992, an Assistant District Director of Investigations for the Immigration and Naturalization Service (the "INS") issued a "Warrant for Arrest of Alien" (the "Warrant") for the arrest of Mr. Smith. The Warrant was issued by the INS agent pursuant to section 242 of

the Immigration and Nationality Act without review by an impartial magistrate and without supporting affirmation or oath. A true and correct copy of the Warrant is attached hereto as "Exhibit A".

On November 19, 1992, Howard Colin Smith was arrested by various government agents and officers pursuant to the aforementioned Warrant. An automatic pistol was allegedly found in Mr. Smith's possession at the time he was arrested.

On December 8, 1992, the Grand Jury charged Mr. Smith with a violation of Title 18 of the United States Code, Section 922(g) for possession of a pistol. Arraignment for this charge is set for January 5, 1992 before this Honorable Court.

The Warrant was issued in gross violation of the Constitutional protections afforded to Mr. Smith by the Fourth Amendment. As a consequence, his resulting arrest was unlawful. Because evidence seized in connection with an unlawful arrest must be suppressed, all evidence gathered by the United States as a result of Mr. Smith's arrest must be excluded. For these reasons, Mr. Smith respectfully requests this Court to suppress all evidence gathered, seized or otherwise obtained by the United States as a result of Mr. Smith's unlawful arrest.

2. ARGUMENT AND AUTHORITY

A. INs Regulation Unconstitutional; warrant Invalid

In order for a warrant to be valid, it must meet the requirements specified in the Fourth Amendment.[1] Specifically, the minimum constitutional requirements for an arrest warrant are: 1) a pre-issuance determination of probable cause; 2) issuance only upon oath or affirmation in support of probable cause; and 3) particularity in describing the person to be arrested. U.S. CONST. amend. IV.

The Supreme Court has consistently and repeatedly stated that the facts justifying probable cause to search or arrest must be subjected to the scrutiny of an impartial magistrate. *United States v. United States District Court*, 407 U.S. 297 (1972); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968); *Aguilar v. Texas*, 378 U.S. 108 (1964); *United States v. Lefkowitz*, 285 U.S. 452 (1931); *B.P. Oil, Inc. v. Marshall*, 509 F. Supp. 802 (E.D. Pa. 1981). In *Johnson v. United States*, 333 U.S. 10 (1948), the Supreme Court noted that the purpose behind the warrant process is to interpose a neutral figure between the arrestee and the officer "engaged in the often competitive enterprise of ferreting out crime." In *Johnson*, the

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[1] Of course, all persons present in the United States including those who are not citizens – must be afforded Fifth Amendment procedural protections in conjunction with any deprivation of liberty. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

Supreme Court emphasized the importance of an impartial review by a magistrate: "[a]ny assumption that evidence sufficient to support a magistrate's disinterested determination to issue a . . . warrant will justify the officers in . . . [acting] . . . without a warrant would reduce the amendment to a nullity. . . . " *Id.*

In addition to the requirement of impartial review by a magistrate, the plain language of the Fourth Amendment states that "no warrants shall issue, but upon probable cause, ***supported by Oath or affirmation***. . . . " U.S. CONST. amend. IV. (emphasis added). Numerous federal and state courts have reiterated the oath or affirmation requirement. *See, e.g., Weeks v. United States,* 232 U.S. 383 (1914); *United States v. Wroblewski,* 105 F.2d 444 (7th Cir. 1939); *Naples v. Maxwell,* 271 F. Supp. 850 (S.D. Ohio 1967). In 1933, the Supreme Court stated the requirement succinctly: "the facts or circumstances from which probable cause is found ***must*** be presented under oath or affirmation." *Nathanson v. United States,* 290 U.S. 41 (1933) (emphasis added).

Astonishingly, the INS regulation pursuant to which the Warrant for Mr. Smith's arrest was issued ignores the most fundamental constitutional requirements for warrant issuance. Section 242.2(c) of the Immigration and Nationality Act reads as follows:

> (c) warrant of arrest. (1) At the time of issuance of the Order to Show Cause . . . the respondent may be arrested and taken into custody under the authority of a warrant of arrest. . . . However such warrant may be issued by no other than [various INS officers and agents, including its]:

(i) District director;
(ii) Acting district director;
(iii) Deputy district director;
(iv) Assistant district director for investigations;
(v) Deputy assistant district director for investigations. . . .

8 C.F.R. § 242.2(c) (1992). Blatantly absent from this regulation are the constitutional requirements that probable cause for warrant issuance be determined by a neutral and detached magistrate and that the arrest warrant be supported by an oath or affirmation.

In *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991), the full court of appeals blasted portions of Section 242 of the Immigration and Naturalization Act as unconstitutional, and chastised the regulations as creating a substantial risk of "error and unfairness." *Id.* at 1368. In an analysis of the INS regulation which provides for warrantless arrests, one concurring justice said:

> Currently, an officer's determination . . . is subject only to review by a second immigration officer, who determines whether prima facie evidence of a violation of the immigration laws exists. If no second officer is available, the prima facie determination may be made by the original arresting officer. At no point does an official detached from the enforcement function test the sufficiency of the evidence to arrest and detain.

Id. (citations omitted). The Justice continued by emphasizing "the importance of neutral and detached review as a protection against the overzealous prosecutor or law

enforcement official." *Id. See also, Goldberg v. Kelly,* 397 U.S. 254, 271 (1970) ("an impartial decision maker is essential"); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971) (warrant did not satisfy the requirements of the Fourth Amendment because it was not issued by a "neutral and detached magistrate"); *Tumey v. Ohio,* 273 U.S. 510, 534 (1927) ("A situation in which an official perforce occupies two practically and seriously inconsistent positions . . . necessarily involves a lack of due process"). A telling footnote in *Flores,* crucial to the instant matter, follows:

> The issuance of a warrant is covered by 8 C.F.R. § 242.2(c). ***These arrest warrants are issued by INS officers, not neutral third parties. Thus[,] even the presence of an arrest warrant does not indicate that the decision to detain has been reviewed by an official independent of the law enforcement function.***

Id. n.3. Section 242.2(c) is the regulation pursuant to which the Warrant for Mr. Smith's arrest was issued.

Finally, in *Shadwick v. City of Tampa,* 407 U.S. 345 (1972), the Supreme Court announced a two-part test to be met by a warrant-issuing magistrate: "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest. . . . "

Because § 242.2(c) calls for the issuance of warrants for arrest by *its own agents,* and not by impartial magistrates or other neutral and detached parties, the regulation is unconstitutional on its face. Furthermore, because the regulation allows for the issuance of warrants without the requirement of an oath or affirmation supportive of

probable cause, the regulation violates the plain language of the Fourth Amendment. It follows that the Warrant for Mr. Smith's arrest, issued pursuant to the unconstitutional INS regulation, is invalid, and his resulting arrest and search illegal.

B. Fruits of Unlawful Arrest Must Be Suppressed

The Supreme Court has long recognized that whenever evidence is seized pursuant to statutory authorizations which are later determined to violate Fourth Amendment principles, the arrest and search are illegal and the evidence obtained therefrom must be excluded. *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Michigan v. DeFillippo*, 443 U.S. 31, 39 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Wong Sun v. United States*, 371 U.S. 471 (1963).

In *Almeida-Sanchez*, the Supreme Court held unconstitutional a search pursuant to an INS regulation that authorized searches of any vehicle within a "reasonable distance" of the border without warrant or probable cause. The Court's decision necessitated suppression of evidence seized during the search.

It is true that the Supreme Court has created certain "good faith" exceptions the exclusionary rule. *United States v. Leon*, 468 U.S. 897 (1984); *Michigan v. DeFillippo*, 443 U.S. 31 (1979).[2] However, these exceptions do not

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[2] When a search of an arrestee is made in good faith and in conformance with constitutional standards, the fact that the statute under which the individual was arrested is later declared unconstitutional will not lead to exclusion of the evidence obtained from the search.

apply in matters such as the instant case, where the arrest warrant is so deficient "that the executing officers cannot reasonably presume it to be valid," (*Leon* at 923), or in matters where the officer ***should have known*** that the underlying statute was unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 355 (1987).

In 1986, the Supreme Court explained instances in which the good faith exception to the exclusionary rule would not apply:

> A statute cannot support objectively reasonable reliance [by a law enforcement officer] if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. ***Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.***

Illinois v. Krull, 480 U.S. 340, 355 (1987).

In the instant matter, the facts are simple and the rules of law are clear. Mr. Smith was arrested pursuant to a Warrant issued without review by an impartial magistrate and without supporting affirmation or oath. Both requirements are clearly mandated by the Fourth Amendment and are common knowledge to every law enforcement officer in this nation. Because the Warrant, arrest and search are unlawful, all evidentiary fruits obtained by the United States in connection therewith must be suppressed.

WHEREFORE, PREMISES CONSIDERED, Mr. Smith respectfully requests that this Honorable Court suppress all evidence in this case that has been, or might in the

future be, gathered, seized or otherwise obtained by the United States as a result of Mr. Smith's unlawful arrest.

Respectfully submitted,

/s/ Thomas W. Mills, Jr.
Thomas W. Mills, Jr.
State Bar No. 14167500
3102 Maple Avenue
Suite 220
Dallas, Texas 75201
(214) 871-0290
Fax: (214) 871-0294

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was forwarded to Assistant United States Attorney Mike Snipes by first class mail on this, the 31 day of December, 1992.

/s/ Thomas W. Mills, Jr.
Thomas W. Mills, Jr.

CERTIFICATE OF CONFERENCE

The prosecutor does not agree with this Motion.

/s/ Thomas W. Mills, Jr.
Thomas W. Mills, Jr.

EXHIBIT A

U.S. Department of Justice
Immigration and Naturalization Service

WARRANT
FOR ARREST OF ALIEN
(Orden de arresto del extranjero)

UNITED STATES OF AMERICA
(Estados Unidos de America)

DEPARTMENT OF JUSTICE
(Departamento de Justicia)

IMMIGRATION AND NATURALIZATION SERVICE
(Servicio de Inmigración y Naturalización)

File No. A27 497 326
(No. del registro)

To any officer in the service of the United States Immigration and Naturalization Service:

(A illegible del Servicia de Immigracion y Naturalisacion de loe Estasioe Unidos:)

From evidence submitted to me, it appears that: (illegible)

Howard Colin SMITH , an alien who entered this country at or near (illegible) New York, New York on or about (illegible) July 29, 1984 , is within the United States in violation of the immigration laws and is therefore liable to being taken into custody as authorized by section 242 of the Immigration and Nationality Act. (illegible)

By virtue of the authority vested in me by the immigration laws of the United States and the regulations

issued pursuant thereto, I command you to take the above named alien into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations. (illegible)

Signature: Neil Jacobs
(*Firma*) Neil Jacobs, Assistant District
Title: Director, Investigations
(*Titulo*)
Date: November 18, 1992
(*Fecha*)

CERTIFICATE OF SERVICE

Served at Dallas, Texas on 11/19 1992 at 4 pm

George C. Illegible	SPECIAL AGENT
Signature of Officer/ Employee	Title of Officer/Employee

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A27 497 326

In the Matter of SMITH, Howard Colin Respondent.

c/o Norfolk City Jail, 811 E. City Hall Avenue, Norfolk, VA. 23510
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;

2. You are a native of Jamaica and a citizen of Jamaica ;

3. You entered the United States at New York, New York on or about 07/29/84;
(date)

4. At that time you were admitted as a visitor for pleasure;

5. On 12/23/85 your status was changed to that of a permanent resident alien;

6. You were, on 11/23/88 in the Circuit Court of Norfolk, VA. convicted of a violation of Section 18.2-250 of the VA. State Code – To wit – unlawful possession of a Controlled Substance (Cocaine).

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(11) of the Immigration and Nationality Act, in that, you at any time have been convicted of a violation of any law or regulation relating to the illicit possession of Cocaine, in violation of Section 18.2-250 of the VA. State Code.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at to be set on to be set at _____ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

C-13

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for, proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: November 23, 1988

/s/ William W. Bittner
(signature and title of issuing officer)
William W. Bittner,
Officer in Charge
Norfolk, Virginia 23510
(City and State)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
DALLAS DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL NO. 3-92-CR-510-G
v.	)	(Filed Jan. 8, 1993)
HOWARD COLIN SMITH	)	

GOVERNMENT RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS AND BRIEF IN SUPPORT THEREOF

COMES NOW the United States, by and through the United States Attorney for the Northern District of Texas, and files this its response in opposition to Defendant's Motion to Suppress Evidence filed with this Court on January 4, 1993. In support thereof, the Government states unto the Court as follows:

I. STATEMENT OF THE FACTS

1) The Defendant is a twenty-five year old male, native and citizen of Jamaica who entered the United States as a nonimmigrant visitor on July 29, 1984. He subsequently adjusted his status to that of a permanent resident on December 23, 1985.

2) On November 19, 1992, the Defendant was arrested by a Federal and State Law Enforcement Task Force which included the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the

Dallas Police Department. The Defendant's arrest was pursuant to an immigration warrant of arrest (Form I-200, attached as Government's Exhibit 1). A search incident to this arrest revealed that the Defendant was armed with a fully loaded, Taurus model 9mm semi automatic pistol.

3) On December 8, 1992, the Defendant was indicted by the Grand Jury for violation of 18 U.S.C. § 922(g), for being a felon in possession of a firearm.

4) On January 4, 1993, the Defendant filed a Motion to Suppress Evidence contending that the Immigration Warrant of Arrest was invalid, and the regulation, and apparently the statute, authorizing such arrests, were unconstitutional. The Defendant also contended that since the arrest was invalid, the fruits of such arrest must be suppressed.

5) The Government contends that the statute and regulation were constitutional, the arrest was valid and its fruits may not be suppressed. Accordingly, the Government requests that Defendant's motion be denied in its entirety. In support thereof, the Government states unto the Court as follows.

II. ARGUMENT

A. The Statute And Regulation Are Constitutional.

8 U.S.C. 1252(a) expressly provides that pending a determination of deportability in the case of any alien, such alien may, upon warrant of the Attorney General, be arrested and taken into custody to await a deportation hearing before an Immigration Judge. Federal regulations at 8 C.F.R. § 242.2(c) provides that at the time of issuance

of the Order to Show Cause, or at any time thereafter, and up to the time the respondent becomes the subject of a duly issued warrant of deportation, the respondent may be arrested or taken into custody under the authority of an INS administrative warrant of arrest. Each of these provisions have been upheld by the Courts and have never been declared unconstitutional. See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Carlson v. Landon*, 342 U.S. 524 (1952); *Johns v. Department of Justice*, 653 F.2d 884 (5th Cir. 1981). In addition, deportation proceedings are civil not criminal in nature and are therefore not subject to the same constitutional safeguards as in criminal actions. *Burquez v. INS*, 513 F.2d 751 (10th Cir. 1975); *Barthold v. U.S.I.N.S.*, 517 F.2d 689 (5th Cir. 1975); *Jolley v. INS*, 441 F.2d 1245 (5th Cir. 1971).

More to the point, the Supreme Court has specifically upheld the INS administrative arrest warrant under circumstances not unlike the instant case. In *Abel v. United States*, 362 U.S. 217 (1960), INS Officers arrested the petitioner on an administrative warrant of deportation, searched the hotel room where he was arrested, his person and his luggage, and seized certain articles. After the petitioner checked out of the hotel room, an FBI agent made a further search of the room without a warrant but with consent of the hotel management and seized further materials. In affirming the petitioner's subsequent conviction for attempted espionage, the Supreme Court held that the searches and seizures did not violate the 4th or 5th Amendments, the Government did not use the administrative warrant of the INS as an improper instrument of the FBI in obtaining evidence for criminal prosecution,

and Immigration Officers who effect an arrest for deportation on an administrative warrant have a right of incidental search analogous to a search to the same extent permitted to criminal law enforcement officers.

It should be noted that the procedure regarding the execution of the arrest warrant in *Abel* was the same as in this case. The arrest warrant was issued by an INS Officer upon presentation by a subordinate INS officer. The Supreme Court in *Abel* found that this arrest warrant procedure "fully complied with the statute and regulations." *Id.* at 233.

Thus, the Defendant's argument that the warrant must be reviewed and approved by an impartial magistrate is clearly erroneous.

It should also be pointed out that this was not an administrative warrant looking for a criminal arrest. At the time of the issuance of the administrative arrest warrant, the INS had no intention of arresting and prosecuting the Defendant on ancillary criminal matters. However, once a search incident to the valid administrative arrest revealed a violation of criminal law, as in *Abel*, the Government was authorized to prosecute the Defendant to the fullest extent under the law.

Abel has been followed in the Fifth Circuit, *Ludwig v. Wainwright*, 434 F.2d 1104 (5th Cir. 1970), as well as other circuits, and has never been overruled. *See also United States v. Alvarado*, 321 F.2d 336 (2nd Cir. 1963); *United States v. De Leo*, 422 F.2d 487, 492 (1st Cir. 1970).

Cases in other contexts have also rejected the notion that all warrant authority must reside exclusively in a

lawyer or judge. *See Shadwick v. City of Tampa*, 407 U.S. 345 (1972) (municipal court clerks authorized to issue arrest warrants for municipal ordinance violations); *United States v. Steed*, 465 F.2d 1310 (9th Cir. 1972); *Albitez v. Beto*, 465 F.2d 954 (5th Cir. 1972) (search warrant not invalid because magistrate who approved warrant helped prepare affidavit of probable cause).

In addition, 8 U.S.C. 1357 provides immigration officers with the authority to make arrests without warrants under certain circumstances which would be applicable in this case. 8 U.S.C. 1357(4) provides that immigration officers have explicit statutory authority to arrest aliens without a warrant who the officer reasonably believed to have committed felonies contrary to the immigration laws, and if there is a likelihood that the person will escape before a warrant can be obtained.

In this case, the INS was in possession of the Defendant's administrative file which clearly indicated he is a native and citizen of Jamaica. (Form I-181 attached as Government's Exhibit 2). Counsel for the Defendant has admitted the Defendant's alienage in his pleadings. See Motion to Suppress Evidence at pg. 1. In addition, the INS was also in possession of a certified copy of the Defendant's prior conviction for possession of cocaine in the Circuit Court of Norfolk, Virginia on November 23, 1988. Exhibit 3. Moreover, the Defendant has two prior convictions for murder with a deadly weapon. Exhibits 4 and 5. The Defendant's criminal record would thus reasonably lead to the likelihood that he is a threat to abscond as well as a danger to the community to the extent that a warrantless arrest would have been permissible. Here, however, the INS took the time to carefully execute

a warrant of arrest which as previously developed, fully comports With due process of law. In addition, the warrant of arrest in this case is in compliance with its regulatory criteria because the arrest warrant was not issued until after the issuance of an Order to Show Cause placing the Defendant in deportation proceedings as required by 8 C.F.R. §242.2(c). Exhibit 6.

Finally, it should be noted that since the Defendant has been convicted of an aggravated felony as defined in 8 U.S.C. 1101(a)(43), his detention is required by statute unless the alien can demonstrate to the satisfaction of the Attorney General that such alien is not a threat to the community, and that the alien is likely to appear for any scheduled hearings. See 8 U.S.C. 1252 (a)(2)(B). As indicated above, the Defendant can make no such showing in this case.

B. The Exclusionary Rule Is Not Applicable In This Case.

The cases cited by the Defendant regarding the exclusionary rule are inapposite to the present case. First of all, the Supreme Court has held that the exclusionary rule is not applicable in civil deportation proceedings, absent egregious circumstances not present here. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

The Defendant also cites *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) for the proposition that the evidence should be suppressed in this case. However, *Almeida-Sanchez* involved a warrantless search without probable cause or consent, as opposed to this case where the Government did have probable cause for a valid

immigration arrest and where criminal activity was discovered in a search incident to a valid arrest warrant.

The Defendant has also cited to *Flores v. Meese,* 942 F.2d 1352 (9th Cir. 1991), regarding the constitutionality of section 242 of the INA. This case was appealed by the Government, and is pending a decision in the Supreme Court following oral argument. *See Barr v. Flores,* No. 91-905 (1992). In any event, this case involves a challenge to Service custodial policy of juvenile aliens, and had nothing whatsoever to do with administrative arrest warrants.

The Defendant has also urged suppression of the evidence based on the fact that a reasonable law enforcement officer should have known that the enabling statute and regulation were unconstitutional, citing *Illinois v. Krull,* 480 U.S. 340 (1987). However, since neither the statute nor its implementing regulation at section 242 of the Immigration and Nationality Act and 8 C.F.R. § 242.2(c) respectively, have ever been held to be unconstitutional, this argument is completely meritless. On the contrary, in *Abel v. United States, supra,* the Court stated as follows with respect to the validity of administrative arrest warrants.

> "There remains overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens such as petitioner. . . .
>
> This Court seems never expressly to have directed its attention to the particular question of the constitutional validity of administrative

> deportation warrants. It has frequently, however, upheld administrative deportation proceedings shown by the Court's opinion to have been begun by arrests pursuant to such warrants. See *The Japanese Immigrant Case*, 189 U.S. 86; *Zakonaite v. Wolf*, 226 U.S. 272; *Bilokumsky v. Tod*, 263 U.S. 149; *Carlson v. Landon*, 342 U.S. 524. In *Carlson v. Landon*, the validity of the arrest was necessarily implicated, for the Court there sustained discretion in the Attorney General to deny bail to alien Communists held pending deportation on administrative arrest warrants. In the presence of this impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation, petitioner's disavowal of the issue below calls for no further consideration.

Id. 233-34.

Thus, it is apparent that the exclusionary rule argument advanced by counsel is as equally meritless as the other bases of this Motion to Suppress Evidence.

III. CONCLUSION

The administrative arrest warrant in this case was validly executed pursuant to law and regulation. Immigration Officers have authority to arrest an individual with warrant pending a determination of deportability. Such officers also have a right of incidental search equal to the search permitted criminal law enforcement officers. The underlying statutory and regulatory scheme is fully constitutional and the exclusionary rule is not applicable

in this case. Accordingly, for all of the foregoing reasons, the Defendant's motion to dismiss must be denied.

Respectfully submitted,

MARVIN COLLINS
United States Attorney

/s/ Michael R. Snipes
MICHAEL R. SNIPES
Assistant U.S. Attorney
United States Attorney
Northern District of Texas
1100 Commerce St – Rm 16G28
Dallas, Texas 75242
(214) 767-0951
Texas Bar #18797900

/s/ James T. Reynolds
JAMES T. REYNOLDS
Special Assistant U.S. Attorney
8101 N. Stemmons Frwy.
Dallas, TX 75247
(214) 655-3041
W. VA Bar No. 3066
No. Bar Nos. in MD and NY

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Suppress Evidence was sent to Thomas W. Mills, Jr., Esq., 3102 Maple Avenue, Suite 220, Dallas, Texas 75201, by regular mail this 8th January 1993.

/s/ Michael R. Snipes
MICHAEL R. SNIPES
Assistant U.S. Attorney

GOVERNMENT EXHIBIT 1

U.S. Department of Justice
Immigration and Naturalization Service

WARRANT
FOR ARREST OF ALIEN
(*Orden de arresto del extranjero*)

UNITED STATES OF AMERICA
(*Estados Unidos de América*)
DEPARTMENT OF JUSTICE
(*Departamento de Justicia*)
IMMIGRATION AND NATURALIZATION SERVICE
(*Servicio de Inmigración y Naturalización*)

File No. A27 497 326
(*No. del registro*)

To any officer in the service of the United States Immigration and Naturalization Service:
(*A cualquier funcionario del Servicio de Inmigración y Naturalización de los Estados Unidos:*)

From evidence submitted to me, it appears that: (*Según las pruebas que se me han presentado, al parecer:*)

Howard Colin SMITH, an alien who entered this country at or near (*extranjero que entró a este pais aproximadamente por*) New York, New York on or about (*aproximadamente, el diá*) July 29, 1984, is within the United States in violation of the immigration laws and is therefore liable to being taken into custody as authorized by section 242 of the Immigration and Nationality Act. (*se encuentra en los Estados Unidos en violación de las leyes de inmigración y, en*

consecuencia, está expuesto a arresto de accuerdo con la sección 242 de la Ley de Inmigración y Nacionalidad.)

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I command you to take the above named alien into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations. (*En virtud de la autoridad que me han otorgado las leyes de inmigratión de los Estados Unidos y los reglamentos promulgados conforme a las mismas, le ordeno que arrests al extranjero mencionado anteriormente para que se someta a los trámites consiguientes según las disposiciones pertinentes de las leyes y los reglamentos de inmigración.*)

Signature: Neil Jacobs
(*Firma*) Neil Jacobs, Assistant District
Title: Director, Investigations
(*Titulo*)
Date: November 18, 1992
(*Fecha*)

CERTIFICATE OF SERVICE

Served at Dallas, Texas on 11/19 1992 at 4PM am/pm.

/s/ George C. Illegible — SPECIAL AGENT
Signature of Officer/ Employee — Title of Officer/Employee)

GOVERNMENT EXHIBIT 2

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Memorandum Illegible of Record of Lawful Permanent Residence

Place
NYC-245

File No.
A27 497 326

Status as a lawful permanent resident of the United States is accorded:

Name In Care Of Street Address Apt. No. City, State, Zip
Howard C. Smith
226 Lefferts Place
Brooklun [sic], NY 11238

Sex
1 [X] Male
2 [ ] Female

Date of Birth (Month/Day/Year)
10/1/67

City of Birth
St. Andrew

Country of Birth
Jamaica

Country of Nationality
Jamaica

Country of Last Residence
Jamaica

Martial Status
1 [X] Single
2 [ ] Married
3 [ ] Widowed
4 [ ] Divorced
5 [ ] Separated

Occupation
N/A

N/I Class at time of Adj.
B-2

Year Adm. to U.S. or Year of Change to Present NI Class (whichever most recent)
7/29/84

Priority Date (Month/Day/Year)
6/29/83

Preference (if any)
P6-7

Country to Which Chargeable (*if any*)
Jamaica

Section 212(a)(14)
1 [ ] Applicable-Submitted
2 [ ] Labor Certification
3 [ ] Not Applicable

Mother's First Name
Delores

Father's First Name
Reken

Last NIV Issued at (U.S. Consulate Post)
Kingston Jamaica

Date of Issuance of Last NIV
8/17/82

Number of Last NIV
011381

Classification of Last NIV
B-2

Under the following provision of law

[ ] Public Law 95-412
[ ] Public Law 96-212

[ ] Private Law No. ___ of the ___ Congress ___ Session
[ ] Sec. 209 (a) of the I & N Act
[ ] Sec. 209 (b) of the I & N Act
[ ] Sec. 244 ( )( ) of the I & N Act
[ ] Sec. 245 of the I & N Act
[ ] Sec. 249 of the I & N Act
[ ] Sec. 1 of the Act of 11/2/66
[ ] Sec. 13 of the Act of 9/11/57
[ ] Sec. 214(d) of the I & N Act
[ ] Other law (Specify)

As of Dec. 23 85 at US NYC
(Month) (Day) (Years) Port of Entry for Permanent Residence

loss of admission *(Insert Symbol)* P6-7

REMARKS

RECOMMENDED BY: *(Immigration Officers) (Date)*
/s/ Frank Lucos 12/23/85

IE

DATE OF ACTION DEC 23 1985

DO Illegible

DISTRICT NEW YORK

OR USE BY VISA CONTROL OFFICE

Site 12/23/85

Foreign State Jamaica

Reference Category Sixth

Member _____

Month of Issuance DEC

Signed October 23, 1985 U.K. received telephonically from VCO, Stapleton
(Visa Office Dept of State)

Page 2 Master Index copy sent on _____

Page 3 ADIT and Statistical report copy sent on 12/26/85

GOVERNMENT EXHIBIT 3

Virginia:

In the Circuit Court of the City of Norfolk, on the 23rd ***day of*** November, ***in the year 19*** 88

COMMONWEALTH vs. Howard Colon Smith, B/M, DOB: 10-1-67, SSN: 075-70-5885, Docket No. 882683F10

Attorney for the Commonwealth: Stuart R. Forbes

Attorney for the accused: James O. Broccoletti

( ) Heretofore appointed by the Court (X) Retained

FELONY TRIAL ORDER

This day came the Attorney for the Commonwealth and the attorney for the accused, as aforesaid, and came as well the accused, in person, who stands indicted for Possession of Cocaine as charged in the Indictment and for Concealed Weapon as charged in the Misdemeanor Warrant.

Whereupon the accused was arraigned and after private consultation with said counsel, tendered in person his plea of Guilty to the said indictment and misdemeanor warrant; and the Court having made inquiry and being of the opinion that the accused fully understood the nature and effects of the said pleas, and of the penalties that may be imposed upon conviction and of the waiver of trial by jury and of appeal, and was satisfied with his counsel; and the Court finding the said plea to be in fact voluntarily and intelligently made, proceeded to hear and determine the case without the intervention of a jury as provided by law. Having heard all the evidence and arguments of counsel, the Court doth find the accused guilty of Possession of Cocaine on the Indictment and Guilty of Concealed Weapon on the Misdemeanor Warrant. The Court then asked the defendant whether he desired to make a statement or to advance any reason why judgment should not be pronounced upon him and nothing being offered or alleged in delay of judgment; it is accordingly the judgment of this Court, pursuant to a written plea agreement, that the defendant be and is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the term of one year for Possession of Cocaine on the Indictment and to confinement in the City Jail for the term of one month for Concealed Weapon on the Misdemeanor Warrant and that he be required to pay the costs of prosecution in the amount of $131.50. And the Court doth order that the execution of the one year sentence and the one month sentence be suspended and the defendant placed on unsupervised probation for the term of one year, conditioned upon good behavior and payment of court costs.

Thereupon the Court doth order that the Norfolk Police Department confiscate the 380 Automatic Handgun taken from the defendant.

And the defendant was remanded to jail.

/s/ Leonard B. Sachs, Judge

(Court Reporter – Doris Derieux)djh
(Howard Colon Smith, B/M, DOB: 10-1-67, SSN: 075-70-5885, Docket #882683F10)

A COPY, TESTE: WILLIAM T. RYAN, CLERK
BY: Illegible, D.C.

GOVERNMENT EXHIBIT 4

NO. F87-80386-ML

180/105 dsw

THE STATE OF TEXAS *IN THE* Criminal *DISTRICT*

VS. *COURT* 5 *OF*

HOWARD COLLIN SMITH *DALLAS COUNTY, TEXAS*

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT – WAIVER OF JURY TRIAL

July TERM, A.D., 1989

JUDGE PRESIDING Pat McDowell

ATTORNEY FOR STATE Bruce Isaacks

OFFENSE CONVICTED OF Murder/DW

DATE OF JUDGMENT: July 11, 1989

ATTORNEY FOR DEFENDANT: Howard Law

DEGREE: 1st
CHARGING INSTRUMENT: INDICTMENT/~~INFORMATION~~

DATE OFFENSE COMMITTED: SEPTEMBER 23, 1986

PLEA: ~~GUILTY~~/NOLO CONTENDERE

TERMS OF PLEA BARGAIN (IN DETAIL) 10 years TDC $750 Fine

PLEA TO ENHANCEMENT PARAGRAPH(S) N/A

FINDINGS ON ENHANCEMENT: N/A

FINDINGS ON USE OF DEADLY WEAPON
The Court finds that defendant herein used or exhibited a deadly weapon during the commission of said offense, to wit: a handgun

DATE SENTENCE IMPOSED July 11, 1989

COSTS: YES/~~NO~~
XX

PUNISHMENT AND PLACE OF CONFINEMENT:
10 years CONFINEMENT IN TEXAS DEPARTMENT OF CORRECTIONS AND A FINE OF $750.00

DATE TO COMMENCE: July 11, 1989

TIME CREDITED
6/30/87 to 7/9/87 and
12/8/88 to 7/11/89

RESTITUTION/REPARATION: YES/NO

CONCURRENT UNLESS OTHERWISE SPECIFIED.

On this day, set forth above, the above styled and numbered cause came to trial. The State and Defendant appeared by and through the above named attorneys and announced ready for trial. Defendant appeared in person in open court. Where Defendant was not represented by counsel, Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel. Defendant, in person and in writing in open Court having waived his right of trial by jury, and where shown above that the charging instrument was by information instead of indictment, the Defendant did, with the consent and approval of his attorney, of the attorney for the State, and the Court, waive his right to prosecution by indictment and agree to be tried on an affidavit and information; all such waivers, agreements and consents being in writing and filed in the papers of this cause prior to the Defendant entering his plea herein, was duly arraigned and in open Court entered the above plea to the charge contained in the charging instrument, as shown above. Defendant was admonished by the Court of the consequences of the said plea and Defendant persisted in entering said plea, and it plainly appearing to the Court that Defendant is mentally competent and said plea is free and voluntary the said plea was accepted by the Court and is now entered of record as the plea herein of Defendant. Defendant in open Court, in writing having waived the reading of the charging instrument, as shown above, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction

of testimony orally, by judicial confession, by affidavits, written statements of witnesses and any other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; and, the Court having heard Defendant's waiver of the reading of the charging instrument, as shown above, Defendant's plea thereto, the evidence submitted, and the argument of counsel, is of the opinion from the evidence submitted that Defendant is guilty of the offense as shown above and that the offense was committed by said Defendant on the date set forth above. The Court further makes its finding as to deadly weapon and restitution on reparation as set forth above.

And when shown above that the charging instrument contains enhancement paragraph(s), which were not waived or dismissed, the Court, after hearing the Defendant's plea to said paragraph(s) as set out above and after hearing further evidence on the issue of punishment, the Court makes its finding as set out above; if true, the Court is of the opinion and finds Defendant has been heretofore convicted of said offenses(s) alleged in the said enhancement paragraph(s) as may be shown above.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that Defendant is mentally competent and understanding of the proceedings.

IT IS, THEREFORE, CONSIDERED AND ORDERED by the Court, in the presence of Defendant, and his attorney that said judgment as set forth above, is hereby in all things approved and confirmed, and that said Defendant be adjudged guilty of the offense as shown above, and that said Defendant

be punished in accordance with the punishment set forth above, and Defendant is sentenced to a term of imprisonment or fine or both as set forth above, and Defendant shall be delivered by the Sheriff to the Director of the Department of Corrections of the State of Texas, or other person legally authorized to receive such convicts for the punishment assessed herein, and said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishments and execution may issue as necessary. It is further ordered the Defendant pay court costs, restitution or reparation, as set forth herein.

And Defendant is remanded to jail until said Sheriff can obey the directions of this judgment.

$67.00 Court Cost.

/s/ Illegible
PRESIDING JUDGE

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT – WAIVER OF JURY TRIAL

ILLEGIBLE ILLEGIBLE, CHARGE MURDER
SPANISH FORT #30illegible DALLAS LOCATION AT LARGE

FILING AGENCY DPD
DATE FILED 7-02-87
COURT _____

COMPLAINANT DERRICK DEANGELO SMITH
F87-83086 ML

C/C WINSTON WILSON

TRUE BILL OF INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand jurors, good and lawful men of the County of Dallas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said Dallas County, upon their oaths do present in and to the 194TH JUDICIAL District Court _____ of Dallas, County, at the JULY Term, A.D., 1987 .

that one, HOWARD COLLIN SMITH

hereinafter styled Defendant, on or about the 23RD day of SEPTEMBER in the year of our Lord One Thousand Nine Hundred and 86 in the County and State aforesaid, did unlawfully, then and there knowingly and intentionally cause the death of DERRICK DEANGELO SMITH, an individual, by shooting said DERRICK DEANGELO SMITH with a handgun, a deadly weapon.

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

JOHN VANCE
Criminal District Attorney
of Dallas County, Texas.

/s/ Henry Holmes
Foreman of the
Grand Jury.

GOVERNMENT EXHIBIT 5

NO. F87-83954-PL

180/103 dsw

THE STATE OF TEXAS *IN THE* Criminal *DISTRICT*

VS. *COURT* 5 *OF*

HOWARD COLLIN SMITH *DALLAS COUNTY, TEXAS*

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT – WAIVER OF JURY TRIAL

July TERM, A.D., 1989

JUDGE PRESIDING Pat McDowell

ATTORNEY FOR STATE Bruce Isaacks

OFFENSE CONVICTED OF Murder/DW

DATE OF JUDGMENT: July 11, 1989

ATTORNEY FOR DEFENDANT: Howard Law

DEGREE: 1st

CHARGING INSTRUMENT: INDICTMENT/[illegible]

DATE OFFENSE COMMITTED: SEPTEMBER 23, 1986

PLEA: [illegible]/NOLO CONTENDERE

TERMS OF PLEA BARGAIN (IN DETAIL) 10 years TDC $750 Fine

PLEA TO ENHANCEMENT PARAGRAPH(S) N/A

FINDINGS ON ENHANCEMENT: N/A

FINDINGS ON USE OF DEADLY WEAPON

The Court finds that defendant herein used or exhibited a deadly weapon during the commission of said offense, to wit: a handgun

DATE SENTENCE IMPOSED July 11, 1989

COSTS: YES/~~NO~~
XX

PUNISHMENT AND PLACE OF CONFINEMENT:
10 years CONFINEMENT IN TEXAS DEPARTMENT OF CORRECTIONS AND A FINE OF $750.00

DATE TO COMMENCE: July 11, 1989

TIME CREDITED
6/30/87 to 7/9/87 & 7/22/87 to 3/29/88 and 12/8/88 to 7/11/89

RESTITUTION/REPARATION ~~YES~~/NO
XX

CONCURRENT UNLESS OTHERWISE SPECIFIED.

On this day, set forth above, the above styled and numbered cause came to trial. The State of Texas and Defendant appeared by and through the above named attorneys and announced ready for trial. Defendant appeared in person in open court. Where Defendant was not represented by counsel, Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel. Defendant, in person and in writing in open Court having waived his right of trial by jury, and where shown above that the charging instrument was by information instead of indictment, the Defendant did, with the consent and approval of his attorney, of the attorney for the State, and the Court, waive his right to prosecution by indictment and agree to be tried on an affidavit and information; all such waivers, agreements and consents being in writing and filed in the papers of this cause prior to the Defendant entering his plea herein, was duly arraigned and in open Court entered the above plea to the charge contained in the charging instrument, as shown above. Defendant was admonished by the

Court of the consequences of the said plea and Defendant persisted in entering said plea, and it plainly appearing to the Court that Defendant is mentally competent and said plea is free and voluntary the said plea was accepted by the Court and is now entered of record as the plea herein of Defendant. Defendant in open Court, in writing having waived the reading of the charging instrument, as shown above, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony orally, by judicial confession, by affidavits, written statements of witnesses and any other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; and, the Court having heard Defendant's waiver of the reading of the charging instrument, as shown above, Defendant's plea thereto, the evidence submitted, and the argument of counsel, is of the opinion from the evidence submitted that Defendant is guilty of the offense as shown above and that the offense was committed by said Defendant on the date set forth above. The Court further makes its finding as to deadly weapon and restitution or reparation as set forth above.

And when shown above that the charging instrument contains enhancement paragraph(s), which were not waived or dismissed, the Court, after hearing the Defendant's plea to said paragraph(s) as set out above and after hearing further evidence on the issue of punishment, the Court makes its finding as set out above; if true, the Court is of the opinion and finds Defendant has been heretofore convicted of said offenses(s) alleged in the said enhancement paragraph(s) as may be shown above.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not

be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that Defendant is mentally competent and understanding of the proceedings.

IT IS, THEREFORE, CONSIDERED AND ORDERED by the Court, in the presence of Defendant, and his attorney that said judgment as set forth above, is hereby in all things approved and confirmed, and that said Defendant be adjudged guilty of the offense as shown above, and that said Defendant be punished in accordance with the punishment set forth above, and Defendant is sentenced to a term of imprisonment or fine or both as set forth above, and Defendant shall be delivered by the Sheriff to the Director of the Department of Corrections of the State of Texas, or other person legally authorized to receive such convicts for the punishment assessed herein, and said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishments and execution may issue as necessary. It is further ordered the Defendant pay court costs, restitution or reparation, as set forth herein.

And Defendant is remanded to jail until said Sheriff can obey the directions of this judgment.

$67.00 Court Cost.

/s/ Illegible
PRESIDING JUDGE

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT – WAIVER OF JURY TRIAL

DEFENDANT SMITH, HOWARD COLIN BM 10-1-67
CHARGE MURDER
ADDRESS 7575 CHAUCER PLACE
LOCATION AT LARGE
FILING AGENCY DPD DATE FILED 7-27-87
COURT _____
COMPLAINANT KENNY MARSHALL F87-83954 PL
C/C _____

TRUE BILL OF INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said Dallas County, upon their oaths do present in and to the 203RD JUDICIAL District Court, _____ of Dallas, County, at the JULY Term, A.D., 1987, that one, HOWARD COLIN SMITH hereinafter styled Defendant, on or about the 4th day of MARCH in the year of our Lord One Thousand Nine Hundred and 87 in the County and State aforesaid, did unlawfully,

> then and there knowingly and intentionally cause the death of KENNY MARSHALL, an individual, by shooting said KENNY MARSHALL with a handgun, a deadly weapon.

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

JOHN VANCE
Criminal District Attorney
of Dallas County, Texas

Dave S. Cear
Foreman of the
Grand Jury

GOVERNMENT EXHIBIT 6

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A27 497 326

In the Matter of SMITH, Howard Colin Respondent.

c/o Norfolk City Jail, 811 E. City Hall Avenue, Norfolk, VA. 23510
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Jamaica and a citizen of Jamaica ;
3. You entered the United States at New York, New York on or about 07/29/84 ;
(date)
4. At that time you were admitted as a visitor for pleasure;
5. On 12/23/85 your status was changed to that of a permanent resident alien;
6. You were, on 11/23/88 in the Circuit Court of Norfolk, VA. convicted of a violation of Section 18.2-250 of the VA. State Code – To wit – unlawful possession of a Controlled Substance (Cocaine).

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(11) of the Immigration and Nationality Act, in that, you at any time have been convicted of a violation of any law or regulation relating to the illicit possession of Cocaine, in violation of Section 18.2-250 of the VA. State Code.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at to be set on to be set at _____ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for, proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: November 23, 1988

/s/ William W. Bittner
(signature and title of issuing officer)
William W. Bittner,
Officer in Charge
Norfolk, Virginia 23510
(City and State)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

[ ] Released on recognizance.

[X] Detained in the custody of this Service.

OR

[X] Released under bond in the amount of $TO BE SET .

You may request the Immigration Judge to redetermine this decision.

[ ] I do

[ ] do not request a redetermination by an Immigration Judge of the custody decision.

(signature of respondent) (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent) (date)

CERTIFICATE OF SERVICE

Served by me at Norfolk, Virginia on November 23, 1988 at 12:30 pm. Personal Service, by Hand, on Respondent

/s/ Shirley Gattison
(signature and title of employee or officer)
SHIRLEY GATTISON
Enforcement Clerk

APPENDIX E

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL NO.
	§	3:92-CR-510-G
V.	§	
	§	(Filed
HOWARD COLIN SMITH	§	Jan. 20, 1993)

DEFENDANT'S REPLY TO
GOVERNMENT RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO SUPPRESS
AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Howard Colin Smith, Defendant herein, by and through his attorney of record, Thomas W. Mills, Jr., and files this, his Reply (the "Reply") to Government Response in Opposition to Defendant's Motion to Suppress and Brief in Support (the Government's "Response") and, in support thereof, would respectfully show unto the Court as follows:

1. BACKGROUND

Howard Colin Smith is a native and citizen of Jamaica. He has resided in the United States since 1984 and achieved "permanent resident alien" immigration status in 1985.

On November 18, 1992, an Assistant District Director of Investigations for the Immigration and Naturalization

Service (the "INS") issued a "Warrant for Arrest of Alien" (the "Warrant") for the arrest of Mr. Smith. The Warrant was issued by the INS agent pursuant to section 242 of the Immigration and Nationality Act without review by an impartial magistrate and without supporting affirmation or oath. A true and correct copy of the Warrant is on file with this Court.

On November 19, 1992, Howard Colin Smith was arrested by a team of various government agents and officers pursuant to the aforementioned Warrant. An automatic pistol was allegedly found in Mr. Smith's possession at the time he was arrested.

On December 8, 1992, the Grand Jury charged Mr. Smith with a violation of Title 18 of the United States Code, Section 922(g) for possession of a pistol.

On January 4, 1993, Mr. Smith filed his Motion to Suppress Evidence and Brief in Support ("Motion to Suppress"), demonstrating for this Court that the Warrant was issued in gross violation of the Constitutional protections afforded to Mr. Smith by the Fourth Amendment and requesting the Court to suppress all evidence gathered, seized or otherwise obtained by the United States as a result of his unlawful arrest.

On or about January 8, 1993, the Government filed its Response, attempting to establish the constitutionality Mr. Smith's arrest and, apparently, to alter nearly thirty years of well-settled evidence law.

The Government's Response is flawed. It relies on authority inapposite to the fundamental issue raised in

Mr. Smith's Motion to Suppress: that the regulation pursuant to which Mr. Smith was arrested is unconstitutional. And, because section 242 of the Immigration and Nationality Act is unconstitutional, the resulting arrest was unlawful. Consequently, all evidence gathered by the United States as a result of Mr. Smith's arrest must be excluded. For these reasons, Mr. Smith respectfully urges this Court to suppress all evidence gathered, seized or otherwise obtained by the United States as a result of Mr. Smith's unlawful arrest.

2. ARGUMENT AND AUTHORITY

A. INS Regulation Unconstitutional; Warrant Invalid

Mr. Smith asserts that section 242 of the Immigration and Nationality Act is unconstitutional as applied to criminal procedures because it calls for the issuance of warrants for arrest by the INS' *own agents*, and not by impartial magistrates or other neutral and detached parties. Mr. Smith also challenges the constitutionality of section 242 because the regulation allows for the issuance of warrants without the requirement of an oath or affirmation supportive of probable cause, thus violating the plain language of the Fourth Amendment.

In an effort to controvert Mr. Smith's assertions, the Government, under the bold and underlined heading titled "The Statute and Regulation Are Constitutional," cites and quotes at length a 1960 Supreme Court decision, *Abel v. United States*, 362 U.S. 217 (1960). The Government's reliance on *Abel* is wholly misguided in this respect: The Supreme Court *specifically stated* that the

issue of the validity of the arrest procedure and warrant by which the petitioner was arrested was ***not*** being considered by *Abel*:

> The claim that the administrative warrant by which petitioner was arrested was invalid, because it did not satisfy the requirements for "warrants" under the Fourth Amendment, is not entitled to our consideration in the circumstances before us.

Id. at 230. Also under the aforementioned heading, the Government's Response states that the Fifth Circuit has "followed" *Abel*, citing *Ludwig v. Wainwright*, 434 F.2d 1104 (5th Cir. 1970). The truth is that the Fifth Circuit cites *Abel* for the inapposite proposition that "a law enforcement officer does not have to ignore stolen property observed during the execution of a valid search warrant." *Ludwig* at 1105-06.

The Supreme Court was very clear in establishing as illegal the use of an administrative warrant as an instrument of criminal law enforcement to circumvent the legal restrictions thereof. *Abel* at 230. In its Response, the Government proffers simply that "this was not an administrative warrant looking for a criminal arrest." The facts and circumstances of Mr. Smith's arrest belie the Government's contention. On November 19, 1992, a team of over six heavily armed officers and agents of the government surrounded and arrested Mr. Smith.

The Government next claims that *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), *Carlson v. Landon*, 342 U.S. 524 (1952), and *Johns v. Department of Justice*, 653 F.2d 884 (5th Cir. 1981) uphold the constitutionality of the suspect INS regulations. However, the cited cases deal

not with criminal proceedings as presently before this Court, but rather with the INS regulations as applied to civil deportation proceedings.

As stated above, Mr. Smith asserts that section 242 of the Immigration and Nationality Act is unconstitutional as applied to these criminal proceedings because it calls for the issuance of warrants for arrest by the INS' *own agents,* and not by impartial magistrates or other neutral and detached parties. The Government has responded to this assertion with cases that simply miss the purpose behind the warrant process: to interpose a neutral figure between the arrestee and the officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10 (1948). The Government cites no case which controverts this long-established requirement for the issuance of warrants. Furthermore, the Government does not even address Mr. Smith's Fourth Amendment challenge of section 242 on the basis of its failure to require an oath or affirmation supportive of probable cause. *See Nathanson v. United States,* 290 U.S. 41 (1933); *Weeks v. United States,* 232 U.S. 383 (1914); *United States v. Wroblewski,* 105 F.2d 444 (7th Cir. 1939); *Naples v. Maxwell,* 271 F. Supp. 850 (S.D. Ohio 1967).

It appears that the legality of section 242 arrest warrants in the context of criminal proceedings has not before been challenged.[1] This is the threshold issue now

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[1] The Ninth Circuit has suggested that such a challenge is appropriate. *See Flores by Galvez-Maldonado v. Meese,* 942 F.2d 1352 (9th Cir. 1991). "The issuance of a warrant is covered by 8 C.F.R. § 242.2(c). ***These arrest warrants are issued by INS officers, not neutral third parties. Thus[,] even the presence of an***

before this Court. Because § 242.2(c) calls for the issuance of warrants for arrest by *its own agents*, and not by impartial magistrates or other neutral and detached parties, the regulation, as applied to criminal proceedings, is unconstitutional on its face. Furthermore, because the regulation allows for the issuance of warrants without the requirement of an oath or affirmation supportive of probable cause, the regulation violates the plain language of the Fourth Amendment.

B. Fruits of Unlawful Arrest Must Be Suppressed

Because section 242 violates the plain language of the Fourth Amendment, the Warrant for Mr. Smith's arrest is invalid and his resulting arrest and search illegal. Consequently, all evidence obtained therefrom must be excluded pursuant to the exclusionary rule.

The Government attempts to deny the applicability of the exclusionary rule in the instant matter by saying, "the Supreme Court has held that the exclusionary rule is not applicable in civil deportation proceedings. . . . " Government's Response at p. 7. Mr. Smith has not in the past, and does not now take issue with this statement. However, the Government's Response is totally inapplicable and irrelevant to the instant case. This matter is not a civil deportation proceeding. It is a criminal matter. For the past thirty years, the United States Supreme Court has recognized the applicability of the exclusionary rule

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arrest warrant does not indicate that the decision to detain has been reviewed by an official independent of the law enforcement function. *Id.* n.3.

in criminal cases. *Ybarra v. Illinois,* 444 U.S. 85 (1979); *Michigan v. DeFillippo,* 443 U.S. 31, 39 (1979); *Torres v. Puerto Rico,* 442 U.S. 465 (1979); *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Wong Sun v. United States,* 371 U.S. 471 (1963). The Government is simply wrong.

The Government is also wrong in taking the position that the good faith exception to the exclusionary rule applies hereto. The Government argues that the good faith exception should apply because section 242 of the Immigration and Nationality act has not yet been declared unconstitutional. Government Response at pp. 7-8. However, the strong weight of the authority holds that it is not necessary that a statute be declared unconstitutional as a requisite to the invocation of the good faith exception. *Illinois v. Krull,* 480 U.S. 340 (1987); *United States v. Leon,* 468 U.S. 897 (1984); *Howard v. State,* 599 S.W.2d 597 (Tex. 1979); *State v. Mendoza,* 748 P.2d 181 (Utah 1987). Rather, as outlined in Mr. Smith's Motion to Suppress, the good faith exception does not apply in matters where the arrest warrant is so deficient "that the executing officers cannot reasonably presume it to be valid," *United States v. Leon,* 468 U.S. at 923, or in matters where the officer **should have known** that the underlying statute was unconstitutional. *Illinois v. Krull,* 480 U.S. at 355 (1987).

Mr. Smith was arrested pursuant to a Warrant issued without review by an impartial magistrate and without supporting affirmation or oath. Both requirements are clearly mandated by the Fourth Amendment and are common knowledge to every law enforcement officer in this nation. Certainly at least one of the several government agents and officers who arrested Mr. Smith should

have known that the Warrant failed to satisfy basic constitutional muster.

Furthermore, in arguing in favor of the applicability of the good faith exception, the Government once again relies on *Abel*, decided by the Supreme Court in 1960. It must be pointed out that the good faith exception to the exclusionary rule had not even been developed until at least twenty-four years later. *United States v. Leon*, 468 U.S. 897 (1984).

Because the Warrant, arrest and search are unlawful, all evidentiary fruits obtained by the United States in connection therewith must be suppressed.

WHEREFORE, PREMISES CONSIDERED, Mr. Smith respectfully requests that this Honorable Court suppress all evidence in this case that has been, or might in the future be, gathered, seized or otherwise obtained by the United States as a result of Mr. Smith's unlawful arrest.

Respectfully submitted,

/s/ Thomas W. Mills, Jr.
Thomas W. Mills, Jr.,
State Bar No. 14167500
3102 Maple Avenue
Suite 220
Dallas, Texas 75201
Tel: (214) 871-0290
Fax: (214) 871-0294

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was forwarded to Assistant United States Attorney Mike Snipes by first class mail on this, the 19th of January, 1993.

/s/ Thomas W. Mills, Jr.
Thomas W. Mills, Jr.

CERTIFICATE OF CONFERENCE

The undersigned was unable to reach Assistant United States Attorney Mike Snipes concerning this Reply Brief, but assumes that Mr. Snipes does not agree with same.

/s/ Thomas W. Mills, Jr.
Thomas W. Mills, Jr.